PUBLIC PROSECUTOR

v.

ZULKIFLI OMAR

HIGH COURT MALAYA, KANGAR
VINCENT NG J
[CRIMINAL APPEAL NOS: 41-03-98 & 41-04-98]
10 MARCH 1998
[1988] CLJ JT(4)

ROAD TRAFFIC: *Causing death by reckless or dangerous driving - Distinction between dangerous driving and reckless driving - Two categories of offences within s. 41(1) of Road Transport Act 1987 - Importance of distinction - Onus of proof - Sentencing - Road Transport Act 1987, ss. 41, 42 & 43*

ROAD TRAFFIC: *Reckless driving - Ingredients of offence - Proof of - Obvious and serious risk of injury to person or damage to property - Failure to consider possibility of obvious risk - Risk realised but nevertheless taken - Whether 'driving dangerously' equals 'driving recklessly' - Speed of vehicle - Other circumstances - Road Transport Act 1987, s. 41(1)*

ROAD TRAFFIC: *Reckless driving - Sentencing - Distinction between dangerous driving and reckless driving under s. 41(1) of Road Transport Act 1987 - Whether sentence dependent on which of the two categories the offence was committed under - Whether reckless drivers of heavy-vehicles to be given heavier sentences - Intention of Legislature - Whether to impose deterrent custodial sentences - Whether courts should utilise full range of penalty open to them under s. 41(1) of Road Transport Act 1987*

ROAD TRAFFIC: *Disqualification - Period of - Reckless driving - Causing death by reckless or dangerous driving - Public protection*

CRIMINAL PROCEDURE: *Sentence - Traffic offences - Road Transport Act 1987, s. 41(1) - Causing death by reckless or dangerous driving - Guidelines for sentencing - Adequacy of sentence - Deterrent sentence - Enhancement - Whether courts should utilise full range of penalty open to them under s. 41(1) of Road Transport Act 1987 - Whether to take judicial notice of very high accident and fatality rates in country*

CRIMINAL PROCEDURE: *Sentence - Traffic offences - Considerations - Defendant driving heavy lorry-trailer - Reckless driving - High degree of wilful culpability - Five persons killed and four injured - Absence of remorse in plea of mitigation - Public appeal for deterrent custodial sentence with long period of disqualification*

The defendant was driving a trailer-lorry along a trunk road when it collided into a group of oncoming motorcyclists, killing five of them and injuring another four. As a result, the defendant was charged in the Magistrate's Court for "causing death by reckless or dangerous driving" under s. 41(1) of the Road Transport Act 1987 ('the RTA'), and was convicted. Thereupon, the defendant was sentenced to 30 days' imprisonment and fined RM7,000 (in default six months' imprisonment), and was also disqualified from holding or obtaining a driving licence for one year. Dissatisfied, the Public Prosecutor appealed against the sentence. The defendant also cross-appealed against his conviction and sentence but withdrew it at the hearing.

Held:

[1] There are **two distinct categories** of offences embodied in s. 41(1) of the RTA, ie, causing death by dangerous driving **or** causing death by reckless driving. The first category encompasses cases in which the accident has arisen through momentary inattention, misjudgment or inadvertence; the second and more serious category consists of those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. [*R v. Guilfoyle*; *Tan Thang Sang & Anor v. PP*; *R v. Boswell*; *Goh Kheng Seong v. PP*]. It is precisely in recognition of this distinction that the Legislature has expressly provided, by s. 41(4) of the RTA, that the court may, upon the trial of a person for an offence under s. 41(1) of the RTA, convict such person of an offence under ss. 42 or 43 of the RTA.

[1a] The meanings of 'driving dangerously' and 'driving recklessly' have not been spelt out by the Legislature and are, therefore, left to the courts. To be guilty of the more serious offence of 'driving recklessly', a driver must have created an obvious and serious risk of injury to a person or damage to property, and must either have given no thought to the possibility of that obvious risk, or have seen the risk but nevertheless decided to take it. It is not in every case that a defendant who is 'driving dangerously' is also 'driving recklessly', although in most cases the two will coincide.

[1b] In an offence under s 41(1) of the RTA, excessive speed is not the sole decider for 'driving recklessly'; there must also be a finding on the manner and the other aspects of the defendant's driving, viz, the prevailing circumstances at the material time of the accident, including the nature, condition and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicle is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proven beyond a reasonable doubt.

[2] It is vital to maintain the dichotomy between the two categories of the offence under s. 41(1) of the RTA as the punishment to be imposed on a defendant is wholly dependent on which of the two categories the offence has been committed under. The legislative target for the imposition of heavy and deterrent penalties is directed at the more serious category of reckless drivers who have shown a high degree of culpability and callous disregard for the safety of other road users. It could never have been the intention of the Legislature to have the courts impose equipollent sentences for both the two categories of the offence under s. 41(1) of the RTA. [*R v. Guilfoyle*; *Tan Thang Sang & Anor v. PP*; *Goh Kheng Seong v. PP*].

[2a] In the absence of any contributory negligence on the part of the victims, the courts ought to impose deterrent custodial sentences, which may extend to five years under s. 41(1) of the RTA, against drivers of heavy-goods vehicles who have been found to be 'driving recklessly'. This is the implied intention of the Legislature.

[3] There are ample statutory sanctions against reckless drivers; these may be employed to much greater effect as the maximum custodial penalty under s. 41(1) of the RTA is five years' imprisonment. Thus, there is a need for the lower courts to demonstrate a greater inclination to utilise the full range of the penalty open to them to impose. In sentencing traffic offenders, the lower courts will have to move with the times. The court must not fail to take judicial notice of the new realities in respect of road use and behaviour in the country (as Malaysia is reported to possess the highest accident fatality rate and the third highest accident rate in the world, consecutively from 1992 to 1996). Where the facts warrant, the court should mete out robust and deterrent custodial sentences.

[3a] The magistrate, in sentencing the defendant, had failed to give any or sufficient consideration to the serious and aggravating features of the case before him – where five lives were lost as a result of the highly culpable recklessness in the defendant's management of the trailer-lorry. Thus, the sentence of 30 days' imprisonment imposed by the magistrate on the defendant was untenable for being grossly inadequate. The sentence must commensurate with and closely reflect the high degree of culpability and recklessness on the part of the defendant.

[3b] In the instant appeal against sentence, the following features of the case had to be considered: (i) the defendant was driving a heavy lorry-trailer – where greater care and caution is expected by the law; (ii) the high degree of wilful culpability on the part of the defendant who was guilty of 'driving recklessly'; (iii) the defendant's callous and reckless driving had caused the death of five persons and injured another four (two of whom seriously); (iv) the defendant's plea in mitigation evinced a remarkable absence of remorse; and (v) the public appeal for a deterrent and substantial custodial sentence with a long period of disqualification.

[3c] The exercise of judicial discretion in respect of sentencing is often based on a tenuous balance between the vital interests of the community at large and the mitigating factors of the crime and the criminal in particular, and upon established principles of sentencing. The duty of the court is also to reflect the concerns of the Legislature and of the public.

Obiter dictum

[1] No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented. To do otherwise would be anathematical to the administration of justice.

[Public Prosecutor's appeal allowed; sentence enhanced to three years' imprisonment and four years' disqualification; particulars of conviction to be endorsed on driving license; and fine of RM7,000 confirmed.]

Cases referred to:

Goh Kheng Seong v. Public Prosecutor [1992] 4 CLJ ***2133 (foll)***
Lee Chow Meng v. Public Prosecutor [1976] 1 MLJ 287 ***(cit)***
Lim Kong v. Public Prosecutor [1962] 28 MLJ ***(cit)***
Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1986] 2 MLJ 30 ***(cit)***
Public Prosecutor v. Choo Teck Heng [1960] 26 MLJ ***(cit)***
R v. Boswell [1984] 3 All ER 353 ***(cit)***

R v. Chadwick [1991] RTR 176 ***(refd)***
R v. Guilfoyle [1973] 2 All ER ***(foll)***
R v. Lawrence [1981] 1 All ER 974 ***(refd)***
R v. Mawson [1992] 13 Cr App Rep(s) 218 ***(cit)***
R v. Reid [1992] 3 All ER 673 ***(foll)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Tan Thang Sang & Anor v. PP [1975] 1 MLJ 204 ***(foll)***
Yong Pak Yong v. Public Prosecutor [1959] 25 MLJ ***(cit)***

Legislation referred to:
Road Transport Act 1987, ss. 41(1), (4), 42, 43, 66(1)(n)

Reported by Gan Peng Chiang

JUDGMENT

Vincent Ng J:

On a fateful day on 19 October 1996 at about 12:30pm a group of 41 Rakan Muda members were partaking in the veritable joys of "club-biking," apparently, one of the healthy passions of the young and adventurous – biking to nowhere in particular but to everywhere in terms of feeling the wind, the laughter, the comradeship and the smart gear. They were travelling along the Kangar-Alor Setar trunk road from the direction of Alor Setar towards Kangar, and, tragically as it turned out, this joyous frolic came to grieve, when, at km 6.6, a 14-wheeler 60-foot long semi-trailer low-loader (trailer-lorry), bearing registration number KAM 621 (TK 1860), carrying a load of iron rods and driven by the defendant from the opposite direction collided into them, killing five of them and injuring four others in the ensuing aftermath.

The defendant was charged for an offence under s. 41(1) of the Road Transport Act 1987 (the Act), which read as follows:

> Bahawa kamu pada 19.10.96 jam lebih kurang 12.30 T/Hari, di KM 6.6, Jalan Kangar – Alor Setar, di dalam Daerah Kangar, di dalam Negeri Perlis, sebagai pemandu M/Traller No. KAM 621 (T/K 1860) telah memandu kenderaan tersebut di atas jalan raya dalam keadaan melulu atau dengan cara merbahaya setelah mengambil kira tentang segala hal keadaan jalan (termasuk jenis, keadaan dan ukuran jalan tersebut) sehingga menyebabkan kematian ke atas penunggang M/Sikal No. PCE 261 Mohd. Azhar bin Abu Bakar, (2) PDF 6009 Hafiz bin Yusof, (3) PDD 4097 Raksut a/l Vichit, (4) PDF 7961 Mohd. Hazlan bin Awang Kechik, (5) PDF 8091 Ahmad Fitri bin Daud. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Sek. 41(1) Akta Pengangkutan Jalan 1987.

On 9 February 1998, after several days trial before the learned magistrate in Kangar, the respondent, Zulkifli bin Omar ('the defendant') was convicted as per charged and sentenced to 30 days' imprisonment and a fine of RM7,000 – in default six months' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of 12 months.

The Deputy Public Prosecutor appealed against sentence, and at the eleventh hour, after vacillating for several days, the defendant also filed a cross-appeal against sentence and conviction.

Considering the alarming rise in traffic accidents and road-deaths as the result of callously reckless or dangerous driving, no doubt contributed by the phenomenal increase in vehicular traffic and change in driver-attitudes, it is of general public importance that I should discuss and endeavour to define and to lay down certain guidelines pertaining to the charge of "causing death by reckless or dangerous driving", under s. 41(1) of the Road Transport Act 1987 ('the Act').

Section 41(1) of the Act reads:

> (1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

The dictum of Lawton LJ in the English Court of Appeal decision in the celebrated case of *R v. Guilfoyle* ([1973] 2 All ER) which concerned a lorry driver who was convicted of causing death by dangerous driving, is illuminating. He had this to say:

> Cases of this kind (causing death by dangerous or reckless driving) fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment (hereafter called the first category), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness (hereafter called the second category).

This distinctive categorisation of dangerous driving was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v. PP and Choong Sze Foong v. PP* [1975] 1 MLJ 204. See also *R v. Boswell* [1984] 3 All ER 353 CA. And more recently, in 1993 this categorisation was also adopted in my decision in *Goh Kheng Seong v. PP* [1993] 1 MLJ p. 103.

It is precisely in recognition of this distinction between the two categories of offences under s. 41(1) for "causing death by reckless or dangerous driving", that the Legislature has, in all its wisdom, made express provision under s. 41(4) that "the court may upon the trial of a person for an offence under this section (s. 41(1)) convict such person for an offence under s. 42 (dangerous and reckless driving but without causing death) or s. 43 (for driving without due care and attention or without reasonable consideration)".

As parliament has not spelt out the meaning of "driving dangerously" or "driving recklessly" it is left to the courts to do so. To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.

It is not in every case where the defendant is in fact driving dangerously that he should be held to be driving recklessly, although in most cases the two will coincide. The definition of the words "driving recklessly" in Lord Diplock's speech in *R v. Lawrence* [1981] 1 All ER 974 at 982, [1982] AC 510 at 526-527, was cited and extensively discussed with approval by the five Law Lords in the recent English House of Lords decision in *R v. Reid* [1992] 3 All ER 673, albeit, redefined and recrafted in less controversial but more focused language, by Lord Goff – a member of the board – which I think it useful that I should set out here:

> On this approach, enlivened by examples, it it, I believe, relatively easy to understand Lord Diplock's encapsulation of the law in his specimen direction, which is to the effect that a jury should only convict a defendant of driving recklessly if they are sure of the following: (i) that he was in fact driving in such a manner as to create a serious risk of causing physical injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognised that there was some risk of that kind involved, but nevertheless went on to take it; or (b) that, despite the fact that he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and the risk was in fact obvious. See also *R v. Boswell and Other Appeals* [1984] 3 All ER 353.

In an offence under s. 41(1), excessive speed is not the sole decider of reckless driving but there must also be a finding on the manner and other aspects of the defendant's driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of accident, including the nature, condition, and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicle is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proved beyond reasonable doubt.

On Conviction

It is pertinent to note that, with the speed limit of '70/80 K.S.J.' imposed and paint-marked on all heavy vehicles (by gazetting by the Minister charged with the responsibility for transport under s. 66(1)(n) of the Road Transport Act 1987), there is an indellible indication that even the Legislature itself intends that heavy-goods vehicles, such as the 14-wheeler trailer driven by the defendant, be treated as in a class of its own, thus prescribing less speed and more caution, in contradistinction with light vehicles. The obvious reason for this implied legislative caveat is that the consequences of such vehicles being driven recklessly would be far more serious than where an ordinary motor vehicle is driven recklessly. Such vehicles with such speed limitations are thus prohibited from driving in excess of 80 K.S.J. even on a German Autobann at 2am, so to say. It would thus follow that should drivers of heavy goods vehicles be found to be reckless in the second category of the offence as defined above, especially in the absence of any contributory negligence on the part of the road victim, the courts ought to impose deterent custodial sentences against them – which may extend to 5 years under s. 41(1) of the Act.

Reverting to the present case, the central fact that was established beyond doubt from the available evidence was that, the lorry-trailer driven by the defendant was in the dire process of overtaking a motor van, at a speed reckoned excessive for its size and weight, when it collided, tore and rammed into the convoy of motor cyclists, then travelling from the opposite direction in a single file. A significant fact that was asserted by no less than three prosecution eye witnesses, PW3 (prosecution witness) and corroborated by PW4 and PW7, and unshaken in close cross-examination by counsel, was that the defendant had made two attempts to overtake a van without engaging his signal lights indicator. And, it was only while in the process of overtaking with a full load of steel bars, on his second attempt, that the collision happened. Further, PW4 had also testified that he (PW4) was following the trailer-lorry in his car at a speed of 70 to 80 km/h, and the trailer-lorry was in turn following a van, all in the same direction. Hence, as the van would then have also been clocking a speed of between 70 to 80 km/h, in order to overtake the van, the defendant must have increased his speed to over 80 km/h. Indeed, the mute evidence showed that the vehicle tyres made two long brake marks, both 9.4m in length and, post-collision, it rested on the other side (his wrong side) of the road on the grass road-table, all of which indicated that the defendant was speeding. Also, it is common ground that the lorry-trailer veered across to the other side of the road pre-collision and not post-collision.

The sole thrust of the defendant's case was that the driver of the van in front had suddenly applied its brakes, which led him to do the same. But, his 60-foot long lorry-trailer couldn't stop, and because there was a motor-cycle on his left, he had to swerve towards his right, thereby colliding with the motor-cycle convoy travelling from the opposite direction. His story deserves no credence, and is untenable as: none of the three prosecution eye witness had seen the phantom motor-cycle mentioned by the defendant; the sketch plan taken at the scene of accident disclosed no trace of any tyre brake-mark on the road that could have been caused by the van; and exh. P7A, a report by Puspakom from an inspection of the trailer-lorry conducted soon after the accident, confirmed that all its 14 tyres, the hand brake, and the foot brake were in satisfactory condition. The state of mechanical and general maintenance of a vehicle is also of material consideration when deciding whether the first or the second category offence under s. 41(1) has been committed.

Thus, after having carefully studied the oral testimony of all the witnesses in conjunction with the documentary and mute evidence tendered at the trial, this court is completely satisfied that the learned magistrate had correctly made a finding that the essential or "core" ingredients of reckless driving had been established beyond reasonable doubt – indeed, in my view, beyond a shadow of a doubt – and that the defendant had been guilty of the more serious (second) category of the offence under s. 41(1) of the Act. He had also found the aggravating and heinous features of the offence, which are of material consideration in sentencing.

This court further holds that the learned magistrate had applied the correct burden of proof at the end of the prosecution as well as the defence case and had not misdirected himself on the law or the facts or erred in point of principle, that has resulted in any injustice to the defendant. Further, looking at the matter as a whole, I would hold that the defendant has failed, before me, to demonstrate that the magistrate had taken into account any irrelevant considerations which affected the outcome of the trial, or had not taken into account any vital or crucial relevant consideration, or had asked himself the wrong question. The defendant's appeal therefore does not warrant appellate interference. However, the above dissertation that pertains to the conviction of the defendant became largely moot or academic, when, during the hearing yesterday morning, he did another of his flip-flop, by withdrawing his appeal against conviction and sentence under Criminal Appeal case No. 41-04-98. But, as I feel that a dissertation on the conviction may yet serve as a future guide for the lower courts, due to a dearth of such cases, I have decided nonetheless to undertake the same.

On Sentence

It is vital to maintain the dichotomy between the two categories of the offence under s. 41(1) of the Act, considering that the nature of punishment to be imposed on a defendant would be wholly dependant upon whether the court has made a finding, beyond reasonable doubt, as to which of the two categories of the offence has been committed. We have to bear in mind that the legislative target for imposition of heavy and deterrent penalties is necessarily and quite rightly directed at the second category of dangerous and reckless drivers; those who have shown a high degree of culpability and callous disregard for the safety of other road users. It is illuminating to note that, pertaining to sentence, Lawton LJ in *R v. Guilfoyle (supra)* had also placed great emphasis on the need for different treatment of traffic offenders, when he said:

> Offenders, too, can be put into categories. A substantial number have good driving records, a fair number have driving records which reveal a propensity to disregard speed restrictions, road signs or to drive carelessly, and a few have records which show that they have no regard whatsoever for either the traffic law or the lives and safety of other road users.
>
> In the judgment of this court an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record should normally be fined and disqualified from holding or obtaining a driving licence for the minimum statutory period or a period not greatly exceeding it, unless of course there are special reasons for not disqualifying. If his driving record is indifferent the period of disqualification should be longer, say two to four years, and if it is bad he should be put off the road for a long time. For those who have caused a fatal accident through a selfish disregard for the safety of other road users or their passengers or who have driven recklessly, a custodial sentence with a long period of disqualification may well be appropriate, and if this kind of driving is coupled with a bad driving record the period of disqualification should be such as will relieve the public of a potential danger for a very long time indeed.

Further, in the same vein, and with his usual clarity of expression, Ong CJ (Malaya) in *Tan Thang Sang v. PP and Choong Sze Foong v. PP (supra)* had this to say:

> All the above cases were, in my opinion, proper to cite, provided that those appellants had behaved as heinously as Downey (*R v. Downey* [1954] MLJ 148) and the others. To thus equiparate the appellants with those people not only implied that these appellants deserved more condign punishment, but also a finding of 'dangerous driving' indistinguishable from the conduct of those other drivers. In none of the five cases were the relevant facts set out at all. Being classed together for punishment, in total disregard of the facts of each

> case, it necessarily follows that these appellants had also been denied due and proper consideration of their defences and the different circumstances under which they became involved in their misfortune.
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> In my view such miscarriage of justice must be rectified. I do not think any motorist should be condemned to serve a long stretch in prison unless in the manner of his driving he had shown a culpable and callous disregard for the safety of other road users. Making scapegoats of innocent motorists is anathema to our administration of justice.

And also, in *Goh Kheng Seong v. PP (supra)*, though I had postulated that:

> in the interests of the motoring public and other users the courts should come down hard on certain motorists charged for dangerous driving, and where the facts warrant, impose custodial sentence which they may richly deserve on a conviction under s. 34A(1) of the Ordinance (s. 41 of the current Road Transport Act 1987).

I had nevertheless also cautioned that:

> a motorist should not be so severely sentenced unless the court is satisfied that the accused had shown beyond question, in the manner of his driving, a high degree of culpability amounting to a wilful and callous disregard for the safety of other road users or a selfish disregard for the safety of other road users or of his passengers as accords with the second definition aforesaid of "dangerous driving" in *R v. Guilfoyle*. In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with characters of an entirely different kind and may thus emerge from prison metamorphosed into a personality, the worse for society.

Driving is part of life for nearly everybody and which, although capable of being done safely, is inherently dangerous. A motor vehicle is a lethal object, capable of inflicting death or serious injury at all times when it is in motion. Whether or not it does so is dependent upon the conduct of the driver throughout the time he is driving. The duty to take care (ie to avoid risk) is part of the obligations of any driver. If he drives in a way that in fact involves an obvious and serious risk and gives no thought to the matter of risk or to the circumstances which make such risk apparent he is in gross breach of those duties.

It can never be the intention of the Legislature to have the courts impose equipollent sentence for both the first as well the second category of the offence under s. 41(1) of the Act, as otherwise, considering the current hazards of driving, it could be said that as soon as one sits behind the steering wheel to drive a vehicle, he assumes the stark potential risk of being either consigned

to prison, for dangerous driving, or to the world beyond, by a reckless driver. One may scream for the severest of punishments to be meted out against persons convicted under s. 41(1) of the Act, without caring to make any distinction between the two categories of such offence. Should it be only when we or our children become involved in the misfortune of causing death through momentary inattention or misjudgment or momentary inadvertence while driving, (which so many of us may, I fear, be guilty of from time to time) with the prospect of a long-term imprisonment hanging over our heads, that the buck and the bark stops?

Our system of justice enjoins the courts to mantain a judicious balance between public interest and the rights of a man in the dock charged for – nay, even convicted of – an offence, to a fair trial and to be heard in mitigation of his offence – surely, an integral part of our bedrock core system of just and justiciable laws, firmly and fairly enforced. Also, not forgetting for a moment, the principle of natural justice as encapsulated by the maxim *audi alterem partem,* the very *sine qua non* principle in the practice of a civil society where the demonstrably civil citizens show the uncivil sections of society how to be civil. In its wake, this 30 days' prison sentence, has attracted heavy public criticisms through the media, calling for a sterner and more condign sentence against such drivers. In the heat of the outcry, some have even suggested that the courts should put aside mitigating factors when innocent lives are lost; in other words, to deny such accused persons the right to plead in mitigation. This would be anathema to our administration of justice, which we have every reason to be proud of; a society does not readily jettison what it treasures.

It is only when a reasoning man assumes the judgment seat, having to earnestly consider also the ramifications and implications of a decision, that is his lot to make, that he soon discovers that things are not as facile as suggested. A worthy judge with an ingrained, inherent and innate desire to do justice, is never influenced by the prevailing mood or passions of the day. In any event he is too old – perhaps even weather-beaten – too inured to be afflicted by strong genuine passions of any kind. No judge or magistrate could rest assured that he is resting on rock-solid *terra firma,* when it comes to sentencing, given that the material facts in, as well as opinion on what is the appropriate sentence for a given offence vary from one case to another. The exercise of his discretion on the sentence to mete out, is often based on a tenuous balance between the vital interests of the community at large, and the mitigating factors of the crime and the criminal in particular, and upon certain sentencing principles, part of which is encapsulated pithily in the words of Hashim Yeop Sani J (as he then was), an illustrious jurist of his time, in *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270, in which his lordship cautioned the courts, that: "No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented."

In my opinion, for about 40 years past (ie, since the 1958 Road Traffic Ordinance) there have been ample statutory sanctions against reckless drivers which could be employed to much greater effect, as the maximum custodial penalty (under the then s. 34A) for dangerous or reckless driving has been, until hitherto, five (5) years' imprisonment. So, it may come as a suprise to the layman that from the historical case-authorities cited by the learned Deputy Public Prosecutor to the learned magistrate in the court below, the custodial sentence meted out by the courts in the past have ranged from one (1) to six (6) months. To be fair to our largely competent magistrates, it must be observed that only in recent times have our citizenry to face the phenomenal upsurge in the number of callously reckless drivers, strange, reckless and aggressive antics of heavy-vehicles drivers (some of them – according to press reports – even high on morphine or heroin), daredevil road weavers on their "iron horses", as well as road-rage thugs with proclivity to bring out their long swords or iron rods, rather than negotiate and exchange visiting cards (of course, road bullies do not carry visiting cards). It can thus be seen that it is unnecessary and unfair to direct too astringent strictures at the learned magistrate in Kangar on the 30 day' custodial sentence that he had imposed.

It is not possible, it needs hardly to be said, to say in advance what the proper sentence should be in any particular case. However, the duty of the court is to reflect the concern of Parliament and also, which is sometimes forgotten, to reflect the concern of the public about these matters.

There is thus the need for the lower courts to demonstrate a greater inclination to utilise the full range of the severity of sentence open to them by statute to impose. And, if more condign punishments could be meted-out in appropriate cases, to fit the gravity of the offence, it would obviate the necessity for introducing the inflexible legislative minimum or mandatory sentence, which would remove the discretion of courts at the expense of justice in the long run. Be that as it may, the ensuing controversy over the learned magistrate's decision in this case has demonstrated that, on sentencing of traffic offenders, the lower courts would have to move with the times or be mowed by a chorus of adverse public opinion. The sentences passed should articulate a response to the growing unease over the phenominal rise in such offences.

Hence, as, under the principle of "judicial notice" (see *Pembangunan Maha Murni Sdn. Bhd. v. Jururus Ladang Sdn. Bhd.* [1986] 2 MLJ 30, *Lee Chow Meng v. PP* [1976] 1 MLJ 287, *Lim Kong v. PP* [1962] 28 MLJ, *Yong Pak Yong v. PP* (1959) 25 MLJ and *PP v. Choo Teck Heng* [1960] 26 MLJ) judges are enjoined to import into their deliberations on questions they have to decide, their knowledge of common affairs of life. In the current appeal this court

must not wear blinkers and fail to take into account the new realities on road use and behaviour in our country – all the more so as such realities are backed up by hard facts and figures. According to a report by the Economic and Social Commission of Asia Pacific (ESCAP), Malaysia has the third highest accident rate in the world and the highest accident fatalities in the world – indeed, for five consecutive years from 1992 to 1996 – with a fatality rate of 8.28 for every 10,000 cars on the road as compared to Finland's 1.80 for every 10,000 cars.

The only aspect of the case where the learned magistrate fell into error was the feeble and inordinately short-term custodial sentence that he had imposed. It would appear that he did not give any or sufficient regard or consideration to the serious and aggravating features of the case, where five (5) precious lives have been lost as the result of the highly culpable recklessness in the defendant's management of the trailer-lorry. This could be readily gleaned from the record of appeal. Thus, the 30 days' imprisonment is untenable for being grossly inadequate, and I would allow the Public Prosecutor's appeal against sentence.

Recently, there has been an increasing phenomenon of callous and culpably reckless heavy-vehicle drivers on our roads. It is my view that the cynical disregard for the safety of other road users by heavy-vehicle drivers, often observed on our roads, may perhaps stem from the thought that they do not (normally) own the vehicles they drive, and that by virtue of the weight and size of their vehicles, the injuries they may sustain should they be involved in any awful road carnage, would be far less severe than occupants of other lighter vehicles – often not so much as a broken toe or leg. Consequently, in the public interest, where the facts warrant, the courts ought not hesitate to mete out robust and deterrent custodial sentence against such drivers. And, in the present case, the sentence must be commensurate with and closely reflect the high degree of culpability and recklessness on the part of the defendant, as aggravated by the magnitude of the carnage that he had caused by his rash act.

On the point of aggravating factors, to govern the court's deliberation in sentencing, perhaps the English Court of Appeal decision in *R v. Chadwick* [1991] RTR 176 is apropos to the case in hand. In that case, the appellant, who was 39 years of age and had been driving commercial vehicles for most of his working life, was driving an articulated motor vehicle carrying a four-ton load along a wet road. He was driving above the speed limit when he started to overtake another large vehicle near a bend in the road. A collision with two other vehicles travelling in the opposite direction caused the death of three people. On his conviction for reckless driving, the appellant was sentenced to

15 months' imprisonment and disqualified from driving for five years. On appeal against sentence, it was held that: the offence was aggravated by the fact that the reckless driving concerned had caused the death of more than one person; the extent to which the offence was aggravated depended upon the particular facts of the case; it was obvious that where a heavy-goods vehicle was driven recklessly the consequences would be more serious than where an ordinary motor vehicle was driven recklessly; and, as the appellant was an experienced driver and the sentence imposed upon him was justified. Accordingly, the appeal was dismissed. (*R v. Boswell* [1984] 3 All ER 353 (1984 Abr para 2365) applied). (See also *R v. Mawson* [1992] 13 Cr. App. Rep(S) 218 - Court of Appeal).

In deciding the appropriate measure of punishment to mete-out in the current case, this court has to factor-in the following catalogue of pretty damning case-features: (a) the defendant was driving a heavy semi-trailer low loader vehicle, where greater care and caution is expected by the law; (b) a high degree of wilful culpability in a very bad piece of reckless driving by the defendant – and thus the gravity of the second category offence – has been established beyond peradventure; (c) this court must never lose sight of the fact that the defendant had, through his callous and reckless driving, snuffed out 5 precious lives and laid waste two (2) others (who suffered multiple bone fractures) to tend to their injuries, perhaps for the rest of their lives – yet in the teeth of which, his plea in mitigation of sentence through counsel here and in the court below, showed a remarkable absence of any feeling of remorse for having caused this loss, pain and grieve multiplied seven fold; and (d) public interest demands that a deterrent and substantial custodial sentence with a long period of disqualification from holding or obtaining a driving licence be meted out to the defendant, so that a resounding message could be conveyed to others of his ilk.

The current case has displayed an uncommon confluence of peculiar facts and circumstances, that would warrant this court imposing a stiff, deterrent and substantial custodial sentence to fit the offence. In the event, after considering such facts and circumstances and the aforesaid case-features, in conjunction with the defendant's plea in mitigation, I feel that the gravity of the offence in the present case would be sufficiently marked by a sentence of three years' imprisonment with effect from the date he commenced serving the current sentence, and particulars of this conviction endorsed on his driving licence; and it is so ordered. Further, in order to relieve the public of a potential danger for a very long time, I also order that the defendant be disqualified for a period of four years from holding or obtaining a driving licence. And, save that the fine of RM7,000 (in default 6 months' imprisonment) imposed by the lower court is here confirmed, all its other orders that are inconsistent with the order

now made are set aside. I believe that in all the circumstances of the case such sentence would best serve public interest.

The punitive custodial sentence which I have just imposed, may appear to be one of the heaviest on record. Nevertheless, it is not inconceivable that, due to the quirks of humankind, some may yet feel that the sentence of three years imprisonment passed on the defendant would appear to be not punitive enough. Be it noted, that when exercising this court's discretion on sentence, I had also taken into account, that: (a) with his disqualification from holding a licence for four years the defendant would lose his job as a lorry driver; (b) the defendant had an unblemish record, in terms of both criminal and traffic trangressions; and (c) he has a wife and 3 children of tender ages to support, as a sole breadwinner.

In Postlude

All said and done, it is my view that if this man in the dock before me has any modicum of wisdom or trace of perception in him, it would not be that difficult for him to decide to go in peace and serve his sentence with equanimity.